Supreme Court, U.S.
FILED
NOV 1 1995
CLERK

No. 95-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COMPAGNIE DE REASSURANCE D'ILE DE FRANCE, *et al.*,

Petitioners,

v.

NEW ENGLAND REINSURANCE CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS NEW ENGLAND REINSURANCE CORPORATION, FIRST STATE INSURANCE COMPANY, AND CAMERON & COLBY CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*DAVID S. MORTENSEN
SHAFNER, GILLERAN & MORTENSEN, P.C.
150 Federal Street, 28th Floor
Boston, MA 02110
(617) 695-9090

ROBERT S. FRANK, JR.
DAVID A. ATTISANI
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-5000

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

31 pp

QUESTIONS PRESENTED

1. Does a plaintiff state a claim under 18 U.S.C. § 1962(a), where it only alleges injury caused by predicate acts of mail and wire fraud but does not (and cannot) allege any injury "by reason of" the use or investment of income derived from a pattern of racketeering activity?

2. Does a plaintiff state a claim under 18 U.S.C. § 1962(b), where it only alleges injury caused by predicate acts of mail and wire fraud but does not (and cannot) allege any injury "by reason of" the acquisition or control of an enterprise through a pattern of racketeering activity?

LIST OF RESPONDENTS' PARENT AND NON-WHOLLY OWNED SUBSIDIARIES

Parent Companies

ITT Corporation is the parent company of all three respondents. ITT New England Management Co., Inc. is the corporate successor to respondent Cameron & Colby Co., Inc.

Non-Wholly Owned Subsidiaries

There are no non-wholly owned subsidiaries to declare.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF RESPONDENTS' PARENT AND NON-WHOLLY OWNED SUBSIDIARIES ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES v

SUMMARY OF THE REASONS FOR DENYING THE WRIT 2

STATEMENT OF THE CASE..... 3

A. The Parties..... 3

B. The Factual Context..... 3

C. The Proceedings Below 5

1. The District Court Decision 5

2. The First Circuit Decision 6

3. The Present Status of the Case 8

STATEMENT OF REASONS FOR DENYING THE WRIT 9

I. THE RICO ISSUES RAISED IN THE PETITION WILL LIKELY BECOME MOOT AS A RESULT OF DECISIONS TO BE MADE DURING THE REMAND PROCEEDINGS 9

A. The Petitioners' RICO Claims Are Likely Barred By The Statute of Limitations..... 10

B. The Petitioners Likely Failed To Prove Elements Of The Alleged Predicate Acts..... 11

C. The Petitioners Likely Waived Their Fraud Claims 13

II. THE "CONFLICT" AMONG THE CIRCUITS, WHICH CONSISTS OF A SINGLE EXCEPTION TO AN OVERWHELMING MAJORITY RULE, DOES NOT WARRANT REVIEW BY THIS COURT 14

III. THE FIRST CIRCUIT'S RULING, AND THE RULINGS OF SEVEN OTHER FEDERAL COURTS OF APPEALS, ARE CORRECT 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	Page
Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987)	11
Amer. Const. Co. v. Jacksonville Railway, 148 U.S. 372 (1893)	9
Apparel Art, Inc. v. Jacobson, 967 F.2d 720 (1st Cir. 1992)	13
Appletree Square I v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994)	12
Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990)	16,17
Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993)	12
Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56 (1st Cir. 1995)	*passim*
Confederate Memorial Ass'n v. Hines, 995 F.2d 295 (D.C. Cir. 1993)	16
Craighead v. E.F. Hutton & Co., 899 F.2d 485 (6th Cir. 1990)	15
Crowe v. Henry, 43 F.3d 198 (5th Cir. 1995)	16
Danielsen v. Burnside - OTT Aviation Training Ctr., 941 F. 2d 1220 (D.C. Cir. 1991)	*passim*
Elias Brothers Restaurants v. Acorn Enterprises, 831 F. Supp. 920 (D. Mass. 1993)	14
Firemen v. Bangor & A.R. Co., 389 U.S. 327 (1967).	9
Grider v. Texas Oil & Gas Corp., 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989)	*passim*

Hamilton Shoe Co. v. Wolf Brothers, 240 U.S. 251 (1916) 9

Heaney v. Associated Bank, N.A., 1990 U.S. Dist. LEXIS 17317 49-50 (E.D. Wis. 1990)..... 15

HJ, Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 13

John and Jane Does 1-85 v. Republic Health Corp., 8 RICO Law Rptr. 828 (D. Nev. 1988) 15

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3rd Cir. 1991)..... 21

Labor Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 16

Layne & Co. v. Western Well Works, 261 U.S. 387 (1923) 16

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993)..... 15,19

Midwest Grinding Co. v. Spitz, 716 F. Supp. 1087 (N.D. Ill. 1989) 15

Nugget Hydroelectric v. Pacific Gas and Elec., 981 F.2d 429 (9th Cir.), *cert. denied*, 113 S. Ct. 2336 (1993) ..... *passim*

Ohio Reinsurance Co. v. Bengston, CV 86-6243/6244 (C.D. Cal. 1993) 15

Old Time Ent. v. Intern. Coffee Corp., 862 F.2d 1213 (5th Cir. 1989)..... 15

Ouaknine v. MacFarlane, 897 F.2d 75 (2d Cir. 1990) *passim*

Parker & Parsley Petroleum v. Dresser Indus., 972 F.2d 580 (5th Cir. 1992)..... 15

Physicians Weight Loss Centers of America v. Creighton, 1992 RICO Business Disputes Guide ¶ 8000 (E.D. Ohio 1992)..... 15

Reves v. Ernst & Young, 113 S.Ct. 1163 (1993) 17, 19

Rose v. Bartle, 871 F.2d 331 (3rd Cir. 1989)..... 15

S&M Exteriors, Inc. v. Amerimark Building Products, Inc., 1992 RICO Business Disputes Guide ¶ 7941 (N.D. Ill. 1991) 15

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). 19,21,22

Sumitomo Marine v. Cologne Reinsurance, 75 N.Y.2d 295, 552 N.E.2d 139 (1990)..... 4

U.S. Concord, Inc. v. Harris Graphics Corp., 757 F. Supp. 1053 (N.D. Cal. 1991) 15

United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) 17

Vemco, Inc. v. Camardella, 23 F.3d 129 (6th Cir. 1994) 16

VMI v. United States, 113 S.Ct. 2431 (1993)..... 9, 10

Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979) 10

Statutes

18 U.S.C. § 1962(a) ..... *passim*

18 U.S.C. § 1962(b) ..... *passim*

18 U.S.C. § 1962(c) 21,22

18 U.S.C. § 1964(c) ..... *passim*

No. 95-478

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMPAGNIE DE REASSURANCE
D'ILE DE FRANCE, *et al.*,

Petitioners

v.

NEW ENGLAND REINSURANCE
CORPORATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS NEW ENGLAND REINSURANCE CORPORATION, FIRST STATE INSURANCE COMPANY, AND CAMERON AND COLBY CO., INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents New England Reinsurance Corporation ("New England Re"), First State Insurance Company ("First State"), and Cameron & Colby Co., Inc. ("Cameron & Colby") hereby oppose the petition for a writ

of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

Petitioners seek interlocutory review of one aspect of a decision of the United States Court of Appeals for the First Circuit. Remand proceedings are ongoing in the District Court. This Court should deny certiorari because the issues raised by the instant petition are likely to be rendered moot by findings and rulings on at least three separate state law issues which are to be decided by the District Court during the remand proceedings. The remand proceedings will establish that petitioners cannot prevail on their RICO claims -- even on petitioners' interpretation of RICO -- because (1) petitioners' claims are barred by the statute of limitations, (2) petitioners cannot prove the elements of the RICO predicate offenses, and (3) petitioners waived the fraud claim which forms the basis for their RICO claims.

Moreover, there is virtually no conflict among the circuits. The First Circuit's decision under 18 U.S.C. § 1962(a) is part of an eight-to-one consensus among the courts of appeal. Its decision under 18 U.S.C. § 1962(b) is consistent with all of the circuit court decisions on the issue. This Court has twice recently denied certiorari review of decisions which are virtually identical to the decision below. The present decision only solidifies the existing consensus among the courts of appeals.

Finally, the First Circuit's decision is compelled by the plain words of Sections 1962(a) and (b) and 18 U.S.C. § 1964(c). Those provisions, read together, allow recovery for injuries occurring "by reason of" the investment of the proceeds of racketeering activity (Section 1962(a)) or "by reason of" the acquisition or maintenance of control in an

enterprise by racketeering activity (Section 1962(b)). Petitioners alleged and proved neither.

STATEMENT OF THE CASE

A. The Parties.

The petitioners are thirty-two British and continental European reinsurance entities. Several are syndicates at Lloyds of London. Others are reinsurance companies. Together, they are among the most sophisticated reinsurers in the world.

New England Re is a reinsurance company. First State is a primary insurance company. Cameron & Colby managed the business of New England Re and First State. All three were, at all relevant times, subsidiaries of the Hartford Group of Insurance Companies.

B. The Factual Context.

This case involves the business of reinsurance. Under a reinsurance agreement, the reinsurer agrees to pay to a primary insurer (*i.e.*, a company that sells insurance to the public) a predefined portion of losses incurred by the primary insurer on an identified risk or group of risks. In exchange, the primary insurer pays a premium to the reinsurer. Like primary insurers, reinsurers often seek to reduce their exposure to losses from a particular risk(s). To that end, they reinsure a portion of their reinsurance, a process called "retrocession." In insurance parlance, a primary insurer "cedes" risks and premium to a reinsurer; a reinsurer "retrocedes" a portion of those risks and that premium to a retrocessionaire. *Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp.*, 57

F.3d 56, 62 (1st Cir. 1995), Pet. App. at A52;[1] *Sumitomo Marine v. Cologne Reinsurance*, 75 N.Y.2d 295, 301, 552 N.E.2d 139, 142 (1990).

The parties' disputes relate to a series of retrocessional agreements, called the "SANS treaties." Tr. 29:67-74; D.Exs. 54-56; Tr. 23:125-126.[2] The treaties were contracts. They were entered annually and covered each of the years 1980-1983. The treaties contemplated that New England Re would reinsure risks initially written by primary insurance companies and would then retrocede a portion of those risks, and associated premium, to the petitioners. *See* D. Exs. 1, 4.

It turned out that the SANS treaties were written at a time in the reinsurance business that the Court of Appeals described as "disastrous." *Compagnie*, 57 F.3d at 92, Pet. App. at A146. Although the treaties produced better than industry average results, they generated significant losses for all concerned -- especially New England Re which retained the largest share of the SANS risks. Tr. 29:67-74; D. Exs. 54-56; Tr. 23:125-126; Tr. 28:139-149; D. Exs. 40-41.

Between 1980 and 1983, New England Re retroceded risks and paid premiums to the petitioners. The petitioners accepted those premiums, and, for a time, they paid their share of the losses. *See* P.Ex. 470. However, as losses

---

[1] References to "Pet. App." indicate the page(s) of the Appendix to the Petition.

[2] References to "Tr." indicate the volume(s) and page(s) of the trial transcript. References to "D. Ex." and "P. Ex." are to the defendants' (respondents') and plaintiffs' (petitioners') trial exhibits, respectively.

mounted, many of the petitioners stopped paying. P.Ex 475; Tr. 22:67. In 1988, years after the treaties were written, petitioners claimed that the treaties had been induced by fraud, and they sought rescission.

In advance of each treaty year, New England Re circulated to the petitioners and others placing materials -- written statements describing, in summary fashion, the reinsurance to be retroceded and the proposed terms of the retrocession. The petitioners alleged that many of the statements contained in the placing materials were misrepresentations, that the petitioners were induced by the misrepresentations to join in the SANS treaties, and that the SANS treaties produced losses.

The instant petition results from the petitioners' repeated, unsuccessful attempts to expand their common law fraud/rescission claim into a RICO treble damage action. They allege (1) that the circulation of placing materials containing misrepresentations constituted mail or wire fraud, and (2) that as a result of that mail or wire fraud, the petitioners entered the SANS treaties, on which they lost money.

C. The Proceedings Below.

1. The District Court Decision.

This action was commenced in the United States District Court for the District of Massachusetts on January 6, 1987. The claims asserted in the original Complaint were substantively different from those which are now alleged. *Compagnie*, 57 F.3d at 68-69, Pet. App. at A72-73. On July 12, 1988, almost nine years after the first of the SANS treaties was executed, the petitioners sought (and they were later granted) leave to file a Second Amended

Complaint in which they advanced several previously unasserted claims, including the petitioners' fraud and RICO claims.

On June 7, 1993, after a jury-waived trial, the District Court (Harrington, J.) found that New England Re fraudulently induced the petitioners to enter, and breached, each of the SANS treaties. However, the court rejected petitioners' RICO claims. It held that the petitioners failed to establish that they suffered an injury caused by a violation of 18 U.S.C. §§ 1962(a) or (b). *Compagnie*, 825 F. Supp. 370, 383 n. 9 (D. Mass. 1993), Pet. App. at A38.

2. The First Circuit Decision.

On June 19, 1995, the First Circuit affirmed the dismissal of petitioners' RICO claims and reversed the trial court's decision in favor of the petitioners on their fraud and contract claims.[3]

The Court of Appeals began by addressing petitioners' common law claims. It identified numerous errors of law in the District Court's decision, reversed many of its factual findings as clearly erroneous, and vacated the judgment. In particular, the Court of Appeals reversed all but one of the trial court's findings that New England Re's placing materials contained misrepresentations. It left standing only the District Court's finding that, in placing materials circulated in advance of the execution of the 1980 SANS

---

[3] The District Court held that New England Re had violated Chapter 93A, § 2 of the Massachusetts General Laws, the Massachusetts unfair trade practices statute. The First Circuit reversed that ruling as well. *Compagnie*, 57 F.3d at 89-91, Pet. App. at A135-141.

treaties, New England Re misrepresented its intention to obtain reinsurance business *directly*[4] from *primary*[5] insurers. However, the Court of Appeals remanded this case to the District Court for the purpose of determining, *inter alia*, whether the petitioners' primary/direct claim is barred by the relevant statutes of limitations, whether each or any petitioner proved that it relied upon the primary/direct misrepresentation, and whether the petitioners acquiesced in New England Re's conduct or otherwise waived their fraud claims. *Compagnie*, 57 F.3d at 84, 86, 89, 94, Pet. App. at A121-123, 126-127, 149-150. Thus, contrary to petitioners' statement, the First Circuit did not affirm the "critical finding" of fraud. *See* Petition at 16. Rather, it stated that there was sufficient evidence to support a finding that New England Re made a single misrepresentation and that "the claim of fraud based on this finding must be given further consideration on remand." *Compagnie*, 57 F.3d at 94, Pet. App. at A150. Petitioners have not prevailed on *any* fraud related claim in this action.

---

[4] Reinsurance business may be obtained from primary insurers by the use of brokers or other intermediaries, or it may be obtained "directly" (*i.e.* without the use of intermediaries). New England Re obtained a portion of the reinsurance that it retroceded to petitioners by the use of insurance intermediaries. The petitioners conceded in the trial court that business obtained through brokers and intermediaries is not inherently better or worse than business obtained directly from primary insurers. Tr. 30:66, 67. *See* Tr. 23:22; 25:106.

[5] It is undisputed that the risks reinsured by New England Re (and retroceded to the petitioners) were written, in the first instance, by primary insurance companies -- indeed, the highest quality, highest rated primary insurers in the United States. Tr. 27:133-143.

The First Circuit then turned to petitioners' RICO claims. *Compagnie*, 57 F.3d at 91-92, 94, Pet. App. at A141-145, 151. In accordance with the decisions of seven other federal courts of appeals, the court explained that "[e]ven assuming that [petitioners] had been defrauded through the use of the mails or international wires [the alleged predicate acts] . . . that alone is not enough." *Id.* It held that under 18 U.S.C. § 1962(a) a plaintiff must "prove that [it was] *harmed* by reason of [the] use or investment of income derived from a pattern of racketeering activity." *Compagnie*, 57 F.3d at 91, Pet. App. at A143 (emphasis by the court). Similarly, and consistent with the decisions of all three of the other federal courts of appeals to consider the issue, the First Circuit held that in order to recover on a claim under 18 U.S.C. § 1962(b), the petitioners were required to demonstrate that they were harmed by the respondents' "acquisition or maintenance of control of an enterprise through a pattern of racketeering activity." The court held that petitioners claimed only that they were "harmed by their participation in the SANS treaties," not by the use or investment of the proceeds of racketeering activity, and not by the acquisition or control of any enterprise through a pattern of racketeering activity. *Compagnie*, 57 F.3d at 92, Pet. App. at A144. It, therefore, affirmed the dismissal of petitioners' RICO claims. *Compagnie*, 57 F.3d at 91-92, Pet. App. at A141-145.

3. The Present Status of the Case.

The case is presently pending in the District Court. Remand proceedings are underway. Initial briefs on the statute of limitations issue are due on November 7, 1995. The trial court has stated its intention to proceed to other issues after it determines which of petitioners' claims, if

any, survive the application of the relevant statutes of limitations.

STATEMENT OF REASONS FOR DENYING THE WRIT

I

THE RICO ISSUES RAISED IN THE PETITION WILL LIKELY BECOME MOOT AS A RESULT OF DECISIONS TO BE MADE DURING THE REMAND PROCEEDINGS.

This Court ordinarily declines to review interlocutory decisions. *E.g., VMI v. United States*, 113 S.Ct. 2431, 2432 (1993) (order denying certiorari and opinion of Scalia, J., respecting the denial of certiorari) (declining to review action remanded for determination of remedy; "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 258 (1916). *See also Amer. Const. Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893).

The instant petition is interlocutory in nature. This case is presently pending in the District Court on remand. The District Court is required by the terms of the remand to address certain issues. As will be demonstrated below, the questions presented by the instant petition are likely to be rendered moot by the District Court's resolution of the issues which the District Court is required to decide. The remand proceedings will establish, among other things, that:

> (a) the petitioners' RICO claims are barred by the statute of limitations;

(b) the petitioners cannot prove elements of the alleged RICO predicate offenses of mail and wire fraud; and

(c) the petitioners waived their fraud claims.

Because the decision of these issues, individually or collectively, is likely to destroy the basis for the petitioners' RICO claims -- even on petitioners' interpretation of RICO -- consideration of the issues advanced in the instant petition should await a final decision by the courts below. When a final decision has been rendered, this Court may determine whether any issue is appropriate for review. *E.g., VMI*, 113 S. Ct. at 2432 (opinion of Scalia, J., respecting the denial of certiorari) (denial of petition during remand "does not, of course, preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered"); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 672 n. 19 (1979).

A. The Petitioners' RICO Claims Are Likely Barred By The Statute Of Limitations.

The First Circuit directed the District Court on remand "to consider the impact of the applicable statutes of limitations on the various claims." *Compagnie*, 57 F.3d at 88, Pet. App. at A132-133. The District Court has recently requested briefing on the statute of limitations issues, stating that "[t]he Court of Appeals' analysis of the statute of limitations issue suggests that a significant part of plaintiffs' case may be time barred." Procedural Order dated October 5, 1995.

The District Court's ruling on this issue is likely to render the instant petition moot. The petitioners first asserted their fraud and RICO claims on July 12, 1988. The limitations period must be measured from that date.

Compagnie, 57 F.3d at 88, Pet. App. at A133. New England Re's alleged misrepresentation -- that it planned to obtain reinsurance directly from primary insurers -- was made (and its alleged mail and wire fraud, therefore, occurred) in 1979, prior to the signing of the 1980 SANS treaties. In late 1980, New England Re fully and accurately disclosed to all petitioners that, during 1980, New England Re did not, in fact, obtain certain reinsurance directly from primary insurers.

A four-year statute of limitations applies. *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987). The petitioners' claims were asserted eight and one-half years after the occurrence, and seven and one-half years after the disclosure, of the alleged fraud. The petitioners' RICO claims are, therefore, barred by the statute of limitations.[6]

B. The Petitioners Likely Failed To Prove Elements Of The Alleged Predicate Acts.

In order to prevail on a claim under 18 U.S.C. §§ 1962(a) and (b), a plaintiff must establish that there has been a "pattern of racketeering activity." 18 U.S.C. § 1962. The petitioners argue that the misrepresentation in New England Re's 1980 placing materials (circulated in

---

[6] Although RICO issues will not be before the District Court on remand, the same (or closely related) conduct forms the basis both for petitioners' RICO claims and for their common law fraud (three-year statute of limitations) and Massachusetts Chapter 93A (four-year limitations period) claims. As a result, the District Court will make findings and rulings in the remand proceedings which bind the parties, and which will effectively resolve statute of limitations issues relating to petitioners' RICO claims.

1979) constituted mail and wire fraud, and, thus, "racketeering activity." To sustain this theory, the petitioners must prove each of the elements of mail or wire fraud. One of the elements of mail and wire fraud is reliance. *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993).

At trial, many petitioners offered no evidence whatsoever that they received, saw, read or relied upon, the 1980 placing materials. *Compagnie*, 57 F.3d at 85-86, Pet. App. at A123-127.[7] Other petitioners testified that they relied on statements in the 1980 placing materials that were different from, and not related to, the only statement that the Court of Appeals ultimately held to be a misrepresentation. All of the petitioners renewed their participation in the 1981 SANS treaties *after* the existence of the alleged misrepresentation was disclosed. *See* pp. 13-14, *infra*.

In prior proceedings, the trial court allowed the petitioners to recover on their common law fraud claims without ever proving actual reliance. *Compagnie*, 57 F.3d at 85, Pet. App. at A123-124. The First Circuit reversed. It held that the trial court's failure to require proof of actual reliance was error. *Compagnie*, 57 F.3d at 84-86., Pet. App. at A124-126. It expressly directed the District Court on remand "to revisit the reliance element and deny recovery to any plaintiff unable to satisfy its burden of proof on this point." *Compagnie*, 57 F.3d at 94, Pet. App.

---

[7] The remand proceedings are confined to the existing trial record.

at A150. It is entirely unclear whether any petitioner can now sustain its burden of proof on the issue of reliance.[8]

C. The Petitioners Likely Waived Their Fraud Claims.

As noted above, the only alleged misrepresentation remaining in this case is New England Re's statement in the placing materials for the 1980 SANS treaties that it planned to obtain business directly from primary insurers. *Compagnie*, 57 F.3d at 81, Pet. App. at A113-114. In the placing materials for the 1981 treaties, however, New England Re explicitly and accurately disclosed that during 1980 all of the reinsurance that it did not obtain directly from First State (a primary insurer) was obtained from Baccala and Shoop Insurance Services, a well-known insurance intermediary. *Compagnie*, 57 F.3d at 83, Pet. App. at A119 ; P. Ex. 4; Tr. 23:119. Upon receipt of this information, none of the thirty-two petitioners complained; none asked that the 1980 treaties be rescinded; none

---

[8] Petitioners' RICO claim is deficient in yet another respect. Whether or not the petitioners prove reliance, they will be required to prove a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). There can be no pattern of "related" acts where, as here, there has been only one misrepresentation. *HJ, Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237 (1989)(requiring multiple, related predicate acts). Multiple repetitions to different persons of a single misstatement do not constitute a pattern of racketeering. *Apparel Art, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992) (Breyer, C.J.) (courts "have consistently held that a single episode does not constitute a 'pattern,' even if that single episode involves behavior that amounts to several crimes (for example, several unlawful mailings)"). Therefore, unless the petitioners affirmatively establish, in the remand proceeding, that New England Re made a second and related misrepresentation, the petitioners will be unable to establish the elements of a RICO violation.

requested a reconfirmation of New England Re's original representation; none asked that a provision be added to the 1981 treaties requiring New England Re to obtain reinsurance business directly from primary insurers; and all agreed to participate in the 1981 treaties. P. Ex. 475; Tr. 22:67-69; 3:127; 25:45.

Citing these facts and others, the First Circuit stated that "if certain plaintiffs [petitioners] renewed their annual participation in the SANS treaties even after becoming aware that defendants [respondents] were using intermediaries and lacked 'direct' business this could affect their right to recover in fraud . . . on some theory of acquiescence or waiver." *Compagnie*, 57 F.3d at 84, Pet. App. at A121. *See also Elias Brothers Restaurants v. Acorn Enterprises*, 831 F. Supp. 920 (D. Mass. 1993). If the District Court concludes that the petitioners waived their only remaining fraud claim, the petitioners' RICO claims will disappear.

For any of the foregoing reasons, the issues presented by the instant petition may be rendered moot by the ongoing proceedings in the courts below. Review by this Court, if any, should await a final decision by the lower courts. Interlocutory review should be denied.

II

THE "CONFLICT" AMONG THE CIRCUITS, WHICH CONSISTS OF A SINGLE EXCEPTION TO AN OVERWHELMING MAJORITY RULE, DOES NOT WARRANT REVIEW BY THIS COURT.

It is undisputed that the First Circuit's interpretation of 18 U.S.C. § 1962(a) is entirely consistent with decisions of the Second, Third, Fifth, Sixth, Ninth, Tenth and District

of Columbia Circuits on precisely the same issue.[9] Similarly, petitioners concede that the First Circuit's interpretation of 18 U.S.C. § 1962(b) is consistent with decisions in the Third, Fifth and District of Columbia Circuits (and numerous district court decisions in other circuits).[10]

---

[9] These courts have held that Sections 1962(a) and 1964(c) require proof of investment injury. *Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 437 (9th Cir.), *cert. denied*, 113 S.Ct. 2336 (1993); *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3rd Cir. 1989); *Parker & Parsley Petroleum v. Dresser Indus.*, 972 F.2d 580-84 (5th Cir. 1992); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir. 1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149-51 (10th Cir.), *cert denied*, 493 U.S. 820 (1989); *Danielsen v. Burnside-OTT Aviation Training Ctr.*, 941 F.2d 1220, 1229-30 (D.C. Cir. 1991).

[10] *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190-91 (3rd Cir. 1993); *Danielsen*, 941 F.2d at 1230-31 (D.C. Cir.); *Old Time Ent. v. Intern. Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1060 (N.D. Cal. 1991); *Midwest Grinding Co. v. Spitz*, 716 F. Supp. 1087, 1090-91(N.D. Ill. 1989); *S&M Exteriors, Inc. v. Amerimark Building Products, Inc.*, 1992 RICO Business Disputes Guide ¶ 7941 (N.D. Ill. 1991); *Physicians Weight Loss Centers of America v. Creighton*, 1992 RICO Business Disputes Guide ¶ 8000 (E.D. Ohio 1992); *John and Jane Does 1-85 v. Republic Health Corp.*, 8 RICO Law Rptr. 828 (D. Nev. 1988); *Heaney v. Associated Bank, N.A.*, 1990 U.S. Dist. LEXIS 17317 49-50 (E.D. Wis. 1990); *Ohio Reinsurance Co. v. Bengston*, CV 86-6243/6244 (C.D. Cal. 1993), reported in Mealey's Litig. Repts. (Reinsurance), Vol. 3, No. 23 (April 14, 1993).

The petitioners rely on a single Fourth Circuit decision under Section 1962(a).[11] Six of the eight decisions that constitute the Section 1962(a) majority rule, and three of the four decisions that constitute the Section 1962(b) unanimous rule, were rendered after the Fourth Circuit decision. There is, as a result, a growing, and now well developed, consensus among the courts of appeals with respect to the issues presented by the instant petition. The decision below merely joins that consensus. There is not the kind of "real and embarrassing conflict of opinion and authority between the circuit courts," which is requisite to review on certiorari. *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Co. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

This Court has recently denied review of the precise issues advanced by the petitioners. *Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 437 (9th Cir.), *cert denied*, 113 S.Ct. 2336 (1993). *See also Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). There is even less reason to grant review of these issues now. Since this Court denied the petition in *Nugget*, all three of the courts of appeals to consider these issues have reaffirmed their commitment to the majority rule. *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 132-133 (6th Cir. 1994); *Confederate Memorial Ass'n v. Hines*, 995 F.2d 295, 298-299 (D.C. Cir. 1993).

The courts of appeals themselves are well along in the process of resolving the extremely limited conflict

---

[11] *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990).

presented by the instant petition.[12] This case does not warrant review by this Court.

III

THE FIRST CIRCUIT'S RULING, AND THE RULINGS OF SEVEN OTHER FEDERAL COURTS OF APPEALS, ARE CORRECT.

The decisions of the First Circuit, and of the other federal courts of appeals that constitute the vast majority rule, are correct. These decisions require proof of what the courts of appeals refer to as "investment injury" and "acquisition injury." This result is compelled by the plain language of §§ 1962(a) and (b). *See Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993)("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (internal citation omitted).

18 U.S.C. § 1962(a) states, in pertinent part:

> It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . *to use or invest*, directly or indirectly, any part of such

---

[12] The Fourth Circuit has demonstrated its willingness to reverse a prior RICO ruling when it found that ruling to be contrary to weight of later appellate decisions. In *Busby*, the Fourth Circuit decision relied upon in the petition, the court reversed its own prior aberrant ruling requiring that a RICO "person" be distinct from an "enterprise" for purposes of Section 1962(a). *See Busby*, 896 F.2d at 841 and n. 9; *compare United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982).

> income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise.

(emphasis supplied). 18 U.S.C. § 1964(c) extends a private right of action to any person injured "*by reason of* a violation of section 1962." (emphasis supplied).

By its plain and unambiguous terms, Section 1962(a) constitutes a prohibition against the investment of the proceeds of racketeering activity. It is not a prohibition upon racketeering activity *per se*. *Grider*, 868 F.2d at 1149 (Section 1962(a) "does not state that it is unlawful to receive racketeering income . . . [rather] the statute prohibits a person *who has received* such income *from using or investing it* in the proscribed manner") (emphasis in original); *Ouaknine*, 897 F.2d at 82 ("mere participation in predicate acts of racketeering" is insufficient).

The federal courts of appeals, with a single exception, have consistently read Sections 1962(a) and 1964(c) to require proof of (1) a use or investment, (2) of racketeering income, and (3) an injury to the plaintiff resulting from -- "by reason of" -- that use or investment (*i.e.*, an "investment injury"). The Ninth Circuit concisely summarized the reasoning underlying these requirements:

> In determining the elements of a RICO claim, we first examine the language of the statute . . . . The plain language of these two provisions [§§ 1964(c) and 1962(a)] leads us to conclude that a plaintiff seeking civil damages for a violation of section 1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income.

Nugget, 981 F.2d at 437. *See also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3rd Cir. 1993) ("the plaintiff must allege an injury resulting from the investment of racketeering income distinct from an injury caused by the predicate acts themselves . . . because Section 1962(a) . . . 'requires that a plaintiff's injury be *caused by the use or investment of income* in the enterprise'") (emphasis in original) (citations omitted).[13]

For similar reasons, the court of appeals decisions under 18 U.S.C. § 1962(b) require proof of an "acquisition injury." Section 1962(b) states:

> It shall be unlawful for any person through a pattern of racketeering activity . . . *to acquire or maintain* any interest in or control of any enterprise.

Read together with Section 1964(c) (which requires proof of an injury "by reason of" a violation of Section 1962), this provision required the petitioners to prove (1) the acquisition or maintenance, (2) of control of an enterprise, (3) through a pattern of racketeering activity and (4) that the plaintiff suffered an injury caused by a prohibited acquisition or maintenance of control.

---

[13] RICO's "liberal construction clause," which is at the heart of petitioners' claim for review, does not operate as an instruction to disregard the plain words of the statute. This Court has stated that the clause "is not an invitation to apply RICO to new purposes that Congress never intended . . . . The clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'" *Reves*, 113 S.Ct. at 1172 (*quoting Sedima*, 473 U.S. at 492, n. 10). *See also Ouaknine*, 897 F.2d at 83 ("that general principle does not permit abrogation of the explicit words of the statute which here limit recovery under § 1962(a) to injury by reason of investment").

As the District of Columbia Circuit said in *Danielsen*:

> [Section 1962(b)] makes it unlawful to acquire control of an enterprise through a pattern of racketeering activity. Therefore, given the language of § 1964(c) set forth above, plaintiffs must allege an "acquisition" injury, analogous to the "use or investment injury" required under § 1962(a) to show injury by reason of a § 1962(b) violation.
>
> * * *
>
> Section 1962(b) requires proof of injury arising from the acquisition or maintenance of an interest in or control of an enterprise.

941 F.2d at 1231.

The petitioners did not prove either an investment injury or an acquisition injury. They alleged only that they were induced by New England Re's misrepresentation to enter the SANS treaties, that the misrepresentation constituted mail and wire fraud, and that they lost money on the SANS treaties. *See* Petition at 21. The petitioners' argument that they are entitled to recover for injuries caused by mail and wire fraud alone, is inconsistent with the words of the statute. Petitioners' proposed interpretation would permit a plaintiff to recover damages without proof either of a prohibited investment or acquisition, or of any injury resulting from such an investment or acquisition. Their interpretation would render most of the language of Sections 1962(a) and (b) surplusage, and would read out of Section 1964(c) the requirement that a plaintiff recover only for injuries which occurred "by reason of" the conduct that constitutes the violation of Sections 1962(a) and (b). Further, petitioners' theory would allow recovery under

each subsection of 18 U.S.C. § 1962 (including Section 1962(c))[14] for injuries resulting from exactly the same conduct -- the commission of predicate acts -- even though each subsection is manifestly designed to prohibit a different type of conduct. That interpretation is simply wrong. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3rd Cir. 1991) ("Section 1962 contains four separate subsections, each addressing a different problem"); *see also Danielsen*, 941 F.2d at 1230 ("if allegations sufficient to base a § 1962(a) action meet all the requirements of a § 1962(c) allegation, then why did Congress pass both?").

The decisions of the eight federal circuits acknowledging the investment injury requirement and the four circuits articulating the acquisition injury rule, were all rendered *after*, and are consistent with, this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *See* Petition at 18-20. *Sedima* states that a "plaintiff only has standing if . . . he has been injured . . . by the *conduct constituting the violation* [of Section 1962]." *Id.* at 496 (emphasis supplied). Petitioners did not allege, and could not prove, that they were injured by the conduct that is prohibited by Sections 1962(a) and (b).

Sedima arose under Section 1962(c), not Sections 1962(a) and (b). The meaning and applicability of Section 1962(c) is not at issue on the present petition. This Court

---

[14] 18 U.S.C. § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." The petitioners' Section 1962(c) claim was rejected by the Court of Appeals and is not the subject of the instant petition. *Compagnie*, 57 F.3d at 92, 94, Pet. App. at A144-145, 151.

said in *Sedima* that "[t]he essence of the violation" of Section 1962(c) is the "commission of [the predicate] acts in connection with the conduct of an enterprise." *Id.* at 497. By contrast, the gravamen of a violation of Section 1962(a) is the *investment* of income derived from racketeering, and the essence of a Section 1962(b) violation is the *acquisition or maintenance* of control of a business as a result of racketeering activity. The post-*Sedima* court of appeals decisions distinguish *Sedima* on this precise ground. *Ouaknine*, 897 F.2d at 83; *Grider*, 868 F.2d at 1150. And, this Court has twice denied certiorari petitions seeking review of post-*Sedima* decisions which articulate the investment injury or acquisition injury rules. *See* p. 16, *supra*.

CONCLUSION

Because the First Circuit's decision is interlocutory in nature, the instant petition presents questions which are not appropriate for review at this time. Moreover, the First Circuit's decision is correct, and is consistent with the decisions of this Court and of seven other federal courts of appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

*David S. Mortensen
SHAFNER, GILLERAN & MORTENSEN, P.C.
150 Federal Street, 28th Floor
Boston, MA 02110
(617) 695-9090

Robert S. Frank, Jr.
David A. Attisani
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 248-5000

**Counsel of Record*

November 1, 1995